CQ363

*Naturam Expellas Furca* *Tamen Usque Recurret*

# WISE USE MOVEMENT

8 September 2002

NEPA Task Force
P.O. Box 221150
Salt Lake City, UT 84122

Dear NEA Task Force:

The Purpose of the WISE USE MOVEMENT is

* To preserve and protect wise, environmentally sound use of public lands, including lands owned by the various states and the Federal government.

* To encourage wise, environmentally protective regulation of private lands by local, state and Federal agencies, including use of land use planning, zoning, and regulation of extractive industries such as mining, grazing and logging on private lands.

* To educate the public as to wise use of public lands and resources and wise and environmentally sound regulation of private property.

* To encourage public participation in the political process at the local, state, and national level.

* To combat distorted and erroneous materials circulated by individuals and organizations promoting environmentally destructive use of public lands and resources, and restricting environmentally sound regulation of private lands and activities.

The WISE USE MOVEMENT supports the following private property responsibilities:

* To share our temporary land ownership with our fellow creatures, wildlife and fish, big and small.

* To seek to restore biological integrity.

*P.O. Box 17804, Seattle, WA 98107*
*www.scn.org/earth/wum/*

* To assist in the recovery of endangered plants and animals.

* To keep hazardous waste from contaminating the land, air and water.

* To protect surface water, groundwater and aquifers.

* To refrain from activities that damage or pollute adjacent temporary owners.

* To protect and preserve sensitive areas, especially wetlands.

* To refrain from activities which damage or degrade natural resources important to the quality of life of our fellow citizens and the sustainability of our communities.

* To leave the land to the next temporary owner in better ecological shape than it was received.

The Wise Use Movement strongly supports the National Environmental Policy Act ("NEPA"). On 1 April 1993, the Wise Use Movement submitted testimony to the U.S. Senate Committee on Environment and Public Works strongly opposing the Clinton Administration's plan to eliminate the Council on Environmental Quality.

We have the following comments to improve the implementation of NEPA:

**Role of NEPA Taskforce**

We are strongly critical of the limited purpose set out for the NEPA Task Force: "to seek ways to improve and modernize NEPA analyses and documentation and to foster improved coordination among all levels of government and the public." The NEPA Task Force must also review the Congressional findings found in Sec. 101 of NEPA.

**Categorical Exclusions**

We are opposed to federal agencies increasing the number of activities that are categorically excluded from NEPA review. An example of the controversy which occurs when agencies seek NEPA exemption is the recent efforts of the U.S. Forest Service to "clarify" the consideration of extraordinary circumstances as they apply to categorical exclusions (August 23, 2002 Federal Register, 67 FR 54622). Rather than support additional categorical exclusions, CEQ should undertake a review of existing agency categorical exclusions and determine whether the individual and cumulative environmental impacts are indeed minimal.

**Environmental Assessments**

We are strongly opposed to CEQ's current NEPA regulations that urge, but do not require agencies to circulate draft environmental assessments for public comment. 40 CFR 1501.4(b). Currently, agencies are allowed to prepare environmental assessment internally and then issue a Finding of No Significant Impact (FONSI) without any public input whatsoever.

Because the decision as to whether a plan, proposal or project would have a significant adverse impact on the environment is the basic issue in preparing an environmental assessment, public notice and comment is critical in this process.

Without a clear requirement from CEQ, public notice and comment on environmental assessments are not consistent even within the same agency. For example, the Corps of Engineers will issue a draft environmental assessment for public review and comment on Corps sponsored projects for the disposal of dredged or fill material. However, applications for Corps permits for the disposal of dredged or fill material from private applicants do not trigger any public review and comment on draft environmental assessments.

In addition, CEQ should undertake a review of the misuse of "mitigation" as a way of weaseling out of EISs. An agency will issue a FONSI on the basis that "mitigation" will reduce the obvious adverse environmental impacts. However, there is no citizen suit provision allowing citizens to enforce "mitigation" conditions. Therefore, much of the value of NEPA in reducing environmental impacts is lost because "mitigation" conditions are never carried out. CEQ should strongly support either administrative or legislative changes that would make mitigation conditions subject to citizen suit enforcement.

**Environmental Impact Statements**

Rather than promote a process allowing development agencies, developers and corporations to complain about NEPA delays in their environmental damaging projects, the NEPA Task Force should recommend that CEQ conduct a review of EIS impact analysis forecasts (as set out in FEISs) with the actual impacts after the projects were approved. How do actual project impacts compare with the impacts described in the FEIS? Without such data, it is impossible to analyze how effective NEPA has been in identifying and avoiding adverse environmental impacts.

While we do not agree with all the NEPA analysis provided by Bradley C. Karkkainen ("Toward a Smarter NEPA: Monitoring and Managing Governments Environmental Performance", Columbia Law Review, May 2002), we find his arguments for postdecision monitoring of NEPA actions and for contingent FONSIs based on periodic reviews compelling.

**Military Projects and Operations**

NEPA could and should have a bigger impact on military projects and operations. CEQ should conduct a special NEPA compliance study on the Department of Defense, including its stupid security exemptions: "We neither confirm or deny the presence of nuclear weapons and other weapons of mass destruction that might obliterate your bio-region.").

**GLOBAL 2000 Report**

Regarding data needs, CEQ is to be commended for issuing the Global 2000 Report to the President, a report requested by President Carter in 1977. However, CEQ has done nothing to update this report, examine its assumptions and conclusions or to prepare a Global 2020

CQ363

Report. Linking EIS monitoring to a Global 2020 report would provide a needed critical bridge between impact assessment and overall environmental policy. These are important tasks for the Council on Environmental Quality and are far more important than the current Task Force's efforts to gut NEPA at the bequest of the business community.

Sincerely,

David E. Ortman
President

CQ363


# NEPA NEWS

A quarterly newsletter about the National Environmental Policy Act

Published by the **Natural Resources Council of America**,
1025 Thomas Jefferson Street NW, Suite 109, Washington, DC 20007

Vol. 4, No. 4 | Robert B. Smythe, Editor | October 2001


## BUSH'S CEQ GEARS UP – SLOWLY

### Energy, Security Concerns Setting Priorities

From the time the Council on Environmental Quality was created in 1970 by Title II of NEPA, it has rarely been a highly visible agency, doing much of its policy development and coordination work on the 'inside' of whatever administration occupies the White House. Internal conflicts over environmental issues can be intense at times, but the public usually gets relatively little information about such conflicts other than via their outcomes.

Exceptions to this pattern have been infrequent and noteworthy. During CEQ's first ten years it had high-profile roles in developing the guidance and regulations for implementing the procedural aspects of NEPA; in focusing public attention on the costs of sprawl and on the negative impacts of large public works projects; and on quantifying the public health effects and economic costs of air and water pollution and contamination from pesticides and toxic substances. CEQ's widely-read "Global 2000" study expanded the analysis of such issues to a global level, and stimulated both public and private initiatives to address such problems as global climate change and threats to biodiversity.

During the 1980s CEQ's role was of necessity less visible and largely defensive, as efforts were made to undo or weaken a variety of environmental laws and regulations. Nevertheless the Council was able to encourage and expand U.S. participation in the development of several key international treaties and conventions and to spur private-sector efforts to preserve biodiversity and protect a range of natural habitats within the U.S.

In the early 1990s CEQ barely survived unexpected attempts by the Clinton administration and the Congress to abolish it, but gradually recovered to play a major part in protecting large areas of undeveloped public land through use of the Antiquities Act and administrative rulemaking to circumvent an uncooperative Congress.

**Looking for CEQ in 2001**

Little was said about CEQ during the first several months of the new Bush administration, leading some to wonder if the Council faced yet another battle for survival. Eventually, however, Washington lawyer James Connaughton was nominated to be CEQ Chairman and was confirmed in that position by the Senate in mid-June (see the previous issue of **NEPA NEWS** for coverage of this process and background on Connaughton). Connaughton said that he looked forward to leading CEQ in its core mission, and began the slow process of filling several vacant staff positions.

At that time much attention was focused on Executive Order 13212, which had established an interagency task force to streamline federal agency review and decisionmaking on projects for the production and transmission of energy. California had been experiencing rolling blackouts, and there was great concern that electric power shortages would spread to other parts of the country. The EO made the CEQ Chairman the chair of the task force, and Connaughton was immediately drawn into White House staff discussions concerning energy policy development and the role of the task force.

Since then not much has been heard from either the Task Force or its chairman. The task force has apparently had one official meeting. On August 10, CEQ published a notice in the Federal Register that invited comments on the proposed nature and scope of task force activities and suggestions on federal processes that should be improved or streamlined. The notice requested that such comments be submitted by October 1 to the CEQ Chairman, by mail, fax, or e-mail to energytaskforce@ceq.eop.gov

Following the tragic events of September 11, CEQ has suddenly been confronted with a new set of urgent issues: helping to resolve environmental

CQ363

experts on a variety of NEPA topics. These included a roundtable discussion of current policy issues with Dinah Bear, CEQ General Counsel, and other federal officials; a panel on applying adaptive ecosystem management to NEPA effectiveness monitoring; a panel on NEPA legal issues, and presentations from various federal officials on integrating NEPA with their agency missions and decision processes. These sessions were all well-attended and generated spirited questioning, debate and comment from the participants.

Karen Frye of Tetra Tech, Inc. presented results of an external survey of federal agency NEPA practitioners that suggested a lack of sufficient managerial-level understanding and/or support within several of those agencies to assure that their NEPA processes were using objective, timely, consistent criteria for evaluating potential impacts and considering alternatives.

Some of the survey respondents questioned whether their work contributed in any substantial way to their own agency's planning and decision-making. Efforts at achieving effective public participation also seemed to vary widely from agency to agency. During the discussion of Ms. Frye's presentation the point was made that the survey respondents were self-selected, and thus constituted a biased sample which could not be assumed to represent a consensus of opinion from practitioners throughout the federal government.

## WHAT DOES NEPA REQUIRE? It's More Than A "Discussion" Document

**By David E. Ortman**

**The Ninth Circuit Needs Reprogramming**

The Ninth Circuit of the U.S. Court of Appeals is often perceived as receptive to reviewing the adequacy of an EIS under the National Environmental Policy Act (NEPA). But right before Christmas 1974, the Ninth Circuit delivered a virus into the web of NEPA decisions, infecting many subsequent agency EISs, which in turn has brought harm to ecosystems that are subject to decisions made on the basis of these flawed EISs.

"A reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an EIS" (Trout Unlimited v. Morton, 509 F. 2d 1276, 1283 (9th Circuit Dec. 23, 1974)). Thus was born the Ninth Circuit's "reasonably thorough discussion" standard. In reality, this is no standard at all.

Ironically, the following year the Ninth Circuit correctly identified the key purpose of the environmental review required for an EIS:

"We must bear in mind the inherent danger that the most serious environmental effects of a project may not be obvious, and that the purpose of the EIS requirement is to ensure that 'to the fullest extent possible' agency decisionmakers have before them and take into proper account a complete analysis of the project's environmental impact. (Calvert Cliffs' Coordinating Committee v. A.E.C. 1971, 449 F.2d 1109)." (Cited in City of Davis v. Coleman, 521 F. 2d 661, 673 (9th Circuit July 30, 1975)).

The key purpose and proper standard identified here is "a complete **analysis** of the project's environmental impact." (Emphasis added.). For a review of the Supreme Court's 1976 "hard look" EIS review standard (Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976)) see Rodgers, William H., "A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny," 67 The Georgetown L. Jour. 699, 704 (1979).

In 1977, the Second Circuit articulated a more demanding "rule of reason," pointing out that the EIS authors must make "...an objectively adequate effort, judged in light of the 'rule of reason,' to compile and present all significant environmental factors and alternatives for the decision-maker's consideration. **Where evidence presented to the preparing agency is ignored or otherwise inadequately dealt with, serious questions may arise about the adequacy of the authors' efforts to compile a complete statement."** (Suffolk County v. Secretary of Interior, 562 F.2d 1368, 1383 (2nd Cir. (N.Y.) 1977) (emphasis added).

In 1980, the Ninth Circuit could still articulate a NEPA review standard with some teeth, even relying on Trout Unlimited: an EIS will be found to be in compliance with NEPA "...when its form, content, and preparation substantially (1) **provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences.**" (Trout Unlimited v. Morton, 509 F.2d 1276, 1282-83 (9th Cir. 1974). (Emphasis added). Cited in Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 781 (9th Cir. (Mont.) 1980)).

However, by 1982, two years into the Reagan Administration's onslaught on the environment, the Ninth Circuit had clearly fallen back on the inadequate and inappropriate "reasonably thorough discussion" standard: "Under this standard of review, we employ a 'rule of reason' that inquires whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." (Trout Unlimited, Inc. v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974). Cited in State of Cal. v. Block, 690 F.2d 753, 761 (9th Cir.(Cal.) 1982).

As recently as 1998, a U.S. District Court in the Northern District of Texas quoted this standard directly from the Ninth Circuit: "But NEPA only requires a reasonably thorough discussion that fosters informed decisionmaking, not a complete evaluation." Stop H-3 Ass'n v. Dole, 740 F. 2d 1442, 1462 (9th Cir. 1984). Cited in Association Concerned About Tomorrow v. Slater, 40 F. Supp.2d 823, 831 (U.S.D.C., N.D. Texas 1998).

Agencies have been quick to hide behind the Ninth Circuit's inadequate 'reasonably thorough discussion standard. Citizen groups recently challenged the adequacy of a U.S. DOT Federal Transit Administration (FTA) FEIS for a light rail project in the Seattle Metropolitan area. The lead agency responded: "The FEIS provides a **reasonably thorough discussion** of significant aspects of the light rail project's probable environmental consequences on the human environment in the Rainier Valley, demonstrating that FTA took a hard look at the impacts." Sound Transit's Response to a Motion for Partial Summary Judgment, Save Our Valley v. Sound Transit and Federal Transit Administration (W. District WA, No. C00-0715R 2000, emphasis added.)

**"Complete Analysis" is the Correct Benchmark**

NEPA and the CEQ regulations require more than a 'reasonably thorough discussion' of significant environmental impacts. A discussion is merely a "consideration of a question in open and usually informal debate" (Merriam Webster's Collegiate Dictionary, Tenth Ed. 1997). Over and over, the CEQ regulations require that agencies prepare "accurate scientific analysis" (40 CFR § 1500.1). Analysis is defined as "separation of a whole into its component parts" (Merriam) while "analyze" means "to study or determine the nature and relationship of the parts by analysis." Id.

The very purpose of NEPA requires "accurate scientific analysis." 40 CFR § 1500.1(b). Agencies are to integrate the NEPA process with other planning at the earliest possible time: "**Environmental documents and appropriate analyses** shall be circulated and reviewed at the same time as other planning documents." Id. § 1501.2(b). (Emphasis added).

During scoping each agency is to "Determine the scope (§ 1508.25) and the significant issues to **be analyzed in depth in the environmental impact statement.**" Id. § 1501.7(a)(2) (emphasis added) and: "Identify other environmental review and consultation requirements **so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.**" Id. § 1501.7 (a)(6) (emphasis added) as well as: "Indicate the relationship between the timing of the **preparation of environmental analyses** and the agency's tentative planing and decisionmaking schedule." Id. (a)(7) (emphasis added).

An EIS is to be ". . .concise, clear, and to the point, and shall be **supported by evidence** that the agency has made the necessary environmental analyses. Id. § 1502.1 (emphasis added).

Agencies are also required to use an EIS format for environmental impact statements "**which will encourage good analysis and clear presentation of the alternatives** including the proposed action." Id. § 1502.10 (emphasis added).

The Alternatives section is the "heart of the environmental impact statement. **Based on the information and analysis presented** in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." Id. § 1502.14 (Emphasis added).

In addition, the environmental consequences section of an EIS "**forms the scientific and analytic basis** for the comparisons under § 1502.14." Id. § 1502.16. (emphasis added).

**Getting Rid Of The "Reasonably Thorough Discussion" NEPA Virus**

It is not too late for the Ninth Circuit to require agencies to take that "hard look" at environmental consequences. That circuit has recently restated the

CQ363

requirements of NEPA regarding an agency's obligation regarding EISs, as follows:

"NEPA does not set out substantive environmental standards, but instead establishes "action-forcing" procedures that require agencies to take a '**hard look**' at environmental consequences. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)." Cited in Metcalf v. Daley, 214 F.3d 1135, 1141-1142 (9th Cir. (WA) Jun 09, 2000)). (Emphasis added).

A U.S. District Court (Western District for Washington State) has also held that an agency's inadequate analysis of potential environmental impacts from an experimental confined aquatic disposal (CAD) for contaminated sediments can fatally flaw an EIS: ". . .given the problems already described **with respect to the Corps' analysis** of RADCAD's potential environmental impacts, the court **finds the Corps' analysis of alternatives and choice of RADCAD as the preferred alternative to be severely deficient."** Friends of the Earth v. Hall, 693 F. Supp. 904, 942 (W.D. Washington, July 20, 1988) (Emphasis added).

The Ninth Circuit has also previously noted the need for analysis, as follows:

"Agencies should employ writers of clear prose or editors to write, review, or edit statements, **which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.** 40 C.F.R. § 1502.8 (1986); see also id. § 1500.2(b) (stating that an EIS "shall be concise, clear, and to the point"); id. § 1502.1 (same); **id. § 1502.2(a) (stating that an EIS "shall be analytic rather than encyclopedic")**; id. § 1500.4(e) ("clear format"); id. § 1502.10 ("clear presentation"). Oregon Environmental Council v. Kunzman, 817 F.2d 484, 493 (9th Cir .(Or.) May 12, 1987). (Emphasis added).

Other District Courts within the Ninth Circuit have recognized the proper CEQ standard: "An EIS provides a detailed written statement that requires in-depth analysis of all potential environmental impacts. 40 C.F.R. § § 1502, 1508.11." Defenders of Wildlife v. Ballard, 73 F.Supp.2d 1094, 1101 (U.S.D.C., D. Arizona Oct. 8, 1999). However, the Arizona District Court was then forced to rely on the fact that "this circuit has fashioned a 'rule of reason' to determine whether the agency has engaged in a 'reasonably thorough discussion of the significant aspects of probable environmental consequences.'" Id. at 1102.

In summary, the Ninth Circuit must review the clear wording in the CEQ's binding NEPA regulations and fix the "reasonably thorough discussion" NEPA virus by installing the correct substitution: a "complete analysis of the project's environmental impact". Or to put it another way, not a "reasonably thorough analysis," but a "**reasoned** thorough analysis" of potential environmental impacts.

*David E. Ortman is President of the Wise Use Movement, P.O. Box 17804, Seattle, WA 98107. He can be contacted via e-mail at* ~~deom@ips.net~~ deom@foxinternet.com

**Editor's Note:** As a consequence of the events of September 11, our usual column by Stephen Miles and Joseph Jean featuring abstracts of recent NEPA cases could not be included in this issue; we expect that it will resume in the next one. Meanwhile, readers with an interest in NEPA litigation are referred to case summaries located on a web page maintained by the NAEP (National Association of Environmental Professionals) at the web address www.naep.org/NEPAWG/recent_cases.html

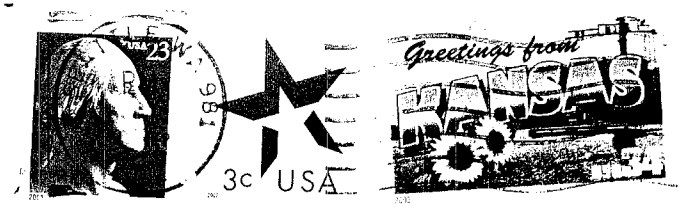
---

**NEPA NEWS** is published quarterly by the Natural Resources Council of America (NRCA). It is the only national publication focusing exclusively on NEPA and the NEPA-related activities of the Council on Environmental Quality (CEQ) and other federal agencies. The subscription rate is $25.00 per year for the printed version, sent via first-class mail, or $20.00 per year for copies sent via e-mail as MS Word file attachments. Subscription payments should be sent via check in U.S. dollars, made out to NRCA/NEPA NEWS and sent to the address below. Please include an e-mail address if you wish to receive NEPA NEWS in that form.

**NEPA NEWS c/o NRCA, 1025 Thomas Jefferson Street NW, Suite 109, Washington, DC 20007.**

The Library of Congress ISSN number for NEPA NEWS is 1089-1439. NRCA's federal employee ID number is 52-6049519. Back issues of NEPA NEWS are available from NRCA at the above address, at $5.00 per issue.

WUIM
PO Box 17504
Seattle, WA 98117




NEPA Task Force
PO Box 221150
Salt Lake City, UT
84122

CQ363

B4122+1150